APPENDICES

A. District Court Memorandum Opinion and Order

B. Seventh Circuit Opinion, *Reeves v. U.S.*, 255 F.3d 389 (7th Cir. 2001)

C. Seventh Circuit Order Denying Petition for *En Blanc* Rehearing

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MICHAEL REEVES,
Petitioner,
v.

No. 99 C 4537
Judge James B. Zagel

UNITED STATES OF AMERICA,
Defendant.

MEMORANDUM OPINION AND ORDER

Petitioner Michael Reeves seeks to vacate his conviction pursuant to 28 U.S.C. § 2255, claiming that his trial attorney failed to provide effective assistance of counsel.[1] In June 1998, a jury convicted Reeves on one count of mail fraud for devising a scheme to defraud his prior employer in violation of 18 U.S.C. § 1343. He was sentenced on June 30, 1999, and filed this petition soon thereafter. As the possibilities of actual innocence and of a per se denial of the defendant's Sixth Amendment rights became apparent soon after his conviction, neither of which necessarily would be resolved on direct appeal, the parties and I agreed that Reeves would take the unusual step of presenting his § 2255 petition during the pendency of his direct appeal. *See United*

[1]At trial, petitioner was represented by two attorneys, Christopher L. Bohlen and L. Patrick Powers. Mr. Powers is the defendant's brother-in-law and provided little to no substantive assistance during the case preparation or trial. He did sit at counsel table during the proceedings.

States v. Robinson; 8 F.3d 398, 405 (7th Cir. 1993)(petition should be entertained when the need for speedy relief is greater than the need for conservation of judicial resources); *see also Fountain v. United States,* 211 F.3d 429, 433 (7th Cir. 2000)("ineffective assistance of counsel claims ... generally are not appropriate for review on direct appeal as they often attempt to rely on evidence outside the record.") The petition is supported by several depositions, additional exhibits. and the defendant's in-court testimony. I also heard oral argument on its merits. With the new evidence in, the claim of actual innocence is significantly weaker than initially thought (perhaps due to problems of proof, perhaps not) and the *per se* Sixth Amendment violation has been abandoned (wisely, in light of my having informed the defendant in open court of his constitutional right to testify). Nevertheless, as the petition has been researched and briefed, in the interest of judicial efficiency and as the parties wish me to do, I decide it at this time.

I. BACKGROUND

A. Evidence Presented at Trial

The government presented the following case at trial. Petitioner Michael Reeves was hired by Cherry Communications, Inc. (CCI), a small telecommunications company, in January 1995. As vice-president of engineering, Reeves's primary job assignment was to acquire and install the equipment necessary to run various switch sites, through which the

company would route long-distance calls. Neither CCI owner James Elliott, nor CCI president Michael Dyer, has technical experience, so they hired Reeves for his technical expertise. Each testified that he thought Reeves had an engineering degree — his resume listed two years at NET and two years at Florida State University, with a B.S. in electrical engineering from the latter – and told others that Reeves was a "double E from MIT."

On July 6, 1995, Reeves submitted a check requisition form for Elliott's approval in the amount of $6,627 for the alleged purchase of electronic equipment from a company called Electronic products, 6645 LaPas, Indianapolis, IN 60164. A postal inspector testified that the listed address does not exist - the zip code is an Illinois zip code, and no such street address exists in Indianapolis. Elliott testified that he did not know what equipment was being purchased, but based on Reeves's representation that the purchase was necessary, he approved the request The accounting department then issued the check, and Reeves picked it up. The *check. which* bore the typewritten endorsement "Electronic Products," was deposited in a bank account that Reeves had opened under the company name, Electronic Renaissance.

On July 14, 1995, Reeves submitted a second check requisition form in the amount of $ 15,172, payable to Electronic Products, and a company invoice. This check requisition form listed the Electronic Products business address as 6264 LaPas, Indianapolis,

IN 60155, *which* address a postal inspector testified is also fictitious. The attached invoice listed yet a third address for Electronic Products, P.O. Box 307, Bradley, IL, which is a post office box Reeves had rented under the name Electronic Renaissance, and indicated that the equipment should be shipped to CCI, not at its actual address, but at one of the fictitious Electronic Products addresses. Elliott approved the request, and a check issued. Again, Reeves picked up the check, and it was deposited into the Electronic Renaissance bank account, with a typewritten endorsement. Both *checks were* meant to purchase switching equipment for CCI's South Federal Street station in Chicago.

Dyer testified that, in August 1995, Reeves recommended to him and Elliott that CCI purchase alarm equipment for its unmanned switch sites. Dyer and Elliott approved the purchase, and Reeves reported back shortly thereafter that he had found a vendor for the equipment, which would cost approximately $88,000. They asked him to negotiate installment payments, which be did. Reeves then submitted a check requisition form and invoice from the vendor, Digital Alarm Products, P.O. Box 172, Bradley, IL, seeking $88,692 payable in four monthly installments. Elliot approved the request. CCI's controller, Cherrie Marks-Pozniak, testified that when Reeves delivered the signed check requisition form to her, she asked him whether she should contact the vendor to establish a payment schedule and that he replied that he would do so, because "the vendor was kind of touchy and didn't like to talk to just anybody."

On September 7, 1995, CCI issued the first installment check in the amount of $22,173, payable to Digital Alarm Products. Reeves picked up the check, and subsequently it was deposited in the Electronic Renaissance bank account. The next day, CCI fired Reeves for poor job performance. On October 18, 1995, CCI issued the second installment check to Digital Alarm Products in the amount of $22,173, which it mailed to the address on the invoice, a post office box that Reeves had opened. This check was electronically endorsed and deposited into the Electronic Renaissance account.

Soon thereafter, Robert Carrabis, the new vice-president of engineering at CCI, called the Digital Alarm Products telephone number to inquire about delivery of the alarm system equipment, which he could not locate, and recognized Reeves's voice on the company's voice mail. Surprised, he told Dyer and Elliott, who say they found that very suspicious, and the company opened an investigation. CCI did not make the third and fourth installment payments on the Digital Alarm Products invoice.

At trial, both Dyer and Elliott testified that they did not know that Electronic Products and Digital Alarm Products were petitioner's companies, or that be was depositing the equipment purchasing checks into a bank account that he controlled. In addition, neither knew what if any equipment was purchased with the first two checks paid to Electronic Products, or whether any equipment had been delivered or installed at the

South Federal Street station. Elliott, Dyer and Carrabis all testified that the alarm system equipment, which was to have been purchased with the installment checks, had not been delivered to the company.

A search by the Illinois and Indiana Secretary of State offices failed to produce any records showing that any of Reeves's companies were incorporated or doing business in their states. It also produced several checks written by Reeves for amounts in excess of $1000 on the Electronic Renaissance account, to American Express, to Kankakee Bell Credit Union loan, to Ameritech, to AT&T, to a Dr. Martello, to himself, and to cash during this same time period. One $12,000 check, written to a company called Technology Programs, was written a few days after the $15,000 CCI check had been deposited in the account, and was deposited into a separate bank account opened by Reeves's wife.

At trial, the defendant cross-examined the government's witnesses, but put on no witnesses of his own. The parties entered a stipulation that CCI filed a voluntary petition for bankruptcy in October 1997 and that neither Digital Alarm Products, nor Electronic Products, nor Michael Reeves were listed as owing money to the company. The defense's theory was that the government had failed to meet its burden in the case, in particular because Elliott, a critical witness, was incredible due to prior criminal convictions, and the government had not sufficiently proved that any check had been mailed using the U.S. Postal Service.

B. Defense Counsel's Preparation

Reeves testified at the evidentiary hearing that he had just three interviews with his trial counsel in the weeks and months leading up to trial: one in September 1997, one in February 1998, and one in May 1998, none of which was particularly lengthy. The case went to trial in June 1998. According to Reeves, none of the interviews included a substantive discussion of the government's case or any extended discussion of his defense to the charge. Bohlen testified by deposition that he has no notes of any initial interview with his client, and only possesses notes from the period of the trial. He cannot recall in any detail what transpired at any of the meetings they had prior to trial.

Reeves says that he told his attorney the very first time they met that he had purchased and installed equipment for the switching station at South Federal Street with the first two checks, and that he could go see the equipment. Bohlen confirm this, and says that he did not investigate the matter except to ask for written documentation of the purchases, which Reeves could not provide. Reeves also says that he told his attorney that he had some of the equipment for the $88,000 contract stored at his home. Bohlen remembers being told that Reeves had an inventory of parts in his garage, some of which might have been suitable for the alarm systems project, but that he had not yet purchased any new equipment for the project. Bohlen also says Reeves told him that he had partially performed on the alarm project by diagraming and

preparing the system, and that the needed equipment would be purchased with funds from the later installation payments.

Reeves says that he provided Bohlen with copies of a memorandum he wrote to Mike Dyer on September 6, 1995, two days before he was fired, detailing the work he had done on the various projects, and with a letter he had written to Elliott in November 1995, offering to complete the project, despite his termination. Bohlen did not use these documents at trial.

Bohlen says that he interviewed no one other than Reeves in preparing for trial. He spoke to none of the government's witnesses and developed no witnesses of his own. He also performed no investigation to discover additional evidence that would support his client's version of events.

From the very start, Bohlen's advice to Reeves was not to testify. According to Reeves, Bohlen never advised him of his constitutional right to testify or explained the rationale behind his advice not to do so.

C. Evidence That Could Have Been Presented

Additional investigation by Reeves's new counsel produced the following evidence, which they submit should have been presented at trial. First, Reeves would testify that he fully performed on the first two checks by purchasing and installing the equipment at the

South Federal Street switching site, and that he partially performed on the alarm system project. He says that performance would have been completed had he received the third and fourth installment payments. He has testified that Elliott knew that he was purchasing the equipment through his own companies, and that he told him to do so because CCI was having financial problems of its own and was having trouble getting credit. Reeves flatly denies that Electronic Products, Digital Alarm Products and Electronic Renaissance are fictitious companies, saying that they have been operational for a number of years, and that he did not know that he had to register them with the Secretary of State.

In addition to his substantive testimony about the case, Reeves can provide personal information about himself, designed to bolster his credibility. He served in the military for ten years, where he had FBI and top-security clearance, and he worked for several reputable telecommunications companies before coming to CCI. Reeves has also testified that he did take isolated classes at MIT over a two-year period, although he did not complete two years of a degree program, and that he never told Elliott or Dyer that he was a "double E from MIT."

To supplement Reeves's testimony, the defense could offer the reports (and presumably the testimony) of an independent investigator who visited the South Federal Street site and Reeves's home to document equipment there. The first report documents that there

is working equipment at the South Federal Street site, which Reeves himself identified as the equipment he purchased. Reeves accompanied the investigator to the site and valued the equipment at a total dollar amount similar to the amounts CCI paid Electronic Products. The second report documents that there is electrical equipment at Reeves's home, which he personally valued at approximately $44,000. In addition, the defense offers the memorandum Reeves wrote to Mike Dyer on September 6, 1995, the day before he was fired, documenting the work he had already done on the various projects, and the letter Reeves wrote to Elliott in November 1995, indicating his willingness to complete the projects even after his termination.

Reeves contends that there are other persons who have engaged in legitimate business practices with him using his various business names who could testify that these names were used on prior contracts, presumably to establish that he was not trying to hide anything. He also believes that additional persons at CCI could testify about the work that he completed while employed by the company. Reeves does not offer the names of any of these individuals or any more detailed analysis of their testimony, nor does he offer their testimony by affidavit or deposition.

Reeves also offers additional impeachment evidence that he could have used against Elliott, namely that he owned CCI at the time the company went bankrupt and had judgments entered against it for nonpayment of taxes.

Reeves contends that all of this evidence could be used to support his defense - not offered at trial - that in 1995, he "went into the electronic market place, obtained bids, placed orders and in fact purchased and obtained electronic equipment and products for James Elliott and Cherry Communications pursuant to Elliott and his agreement that he do so for $88,642.00, and thus lacked any intent to defraud Cherry Communications."

II. DISCUSSION

To prevail on his ineffective assistance claim, Reeves must satisfy the well-worn standards established in *Strickland v. Washington,* 466 U.S. 668, 687 (1984), recently-reaffirmed by the Supreme Court. See *Williams v. Taylor,* 120 S. Ct 1495 (2000). He must demonstrate that his trial counsel's performance "fell below an objective level of reasonableness," considering all the circumstances, and that the deficient performance so prejudiced the defense that it deprived ee es of a fair trial. *Strickland* 466 U.S. at 687; *Fountain,* 211 F.3d at 434. Prejudice is established if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694. In evaluating this claim, I am, of course, ever mindful that there exists a strong presumption that counsel ,rendered reasonably effective assistance. See *United States v. Muehlbauer,* 892 F.2d 664, 668 (7th Cir. 1990); see also *Strickland,* 466 U.S. at 690.

A. Bohlen's Performance

Reeves contends his trial attorney was deficient: (1) by failing to conduct a meaningful interview with his client; (2) by failing to interview any government witness or defense witness or otherwise to adequately prepare for trial; (3) by failing to investigate leads that resulted in exculpatory evidence; (4) by failing to develop and understand Reeve's only real defense; and (5) by failing to call him at trial or to advise him adequately on his right to do so. At the core of each of these charges is counsel's failure to make reasonable inquiries in preparing the case or to have a reasonable explanation for his decision not to investigate, one or the other of which an attorney is duty-bound to do. See *Strickland*, 466 U.S. at 691.

Bohlen's performance was anything but exemplary. It is undisputed that Reeves told him that he had purchased equipment for the South Federal Street site with the first two checks, yet save for asking for documentation, he did nothing to investigate or to corroborate the information. There is a factual dispute about what Reeves told his lawyer about his performance on the second project. But, even taking Bohlen's word, Reeves informed him that he had partially performed on the alarm systems project by diagraming the equipment pursuant to an agreement between him and Elliott and that he had certain equipment on hand that he thought was possibly suitable to the project. Bohlen made no effort to corroborate Reeves's word that he had performed some

work on the project and that he had some equipment on hand that was suitable for the site. Further, he made no effort to interview Elliott or Dyer or any government witness to, at the very least, judge their demeanor and credibility on the witness stand.

Given Reeves's inability to put on his proffered defense without either testifying himself or by providing corroborative evidence, his attorney's failure to investigate his client's story cannot be seen to be objectively reasonable trial strategy. In fact, in light of Bohlen's view that Reeves should not testify, his failure to try to find corroborative evidence is particularly egregious, as it guaranteed the jury would not hear the information in any form. In short, Reeves's inability to coherently and persuasively present his own defense due to credibility problems only aggravated his counsel's lack of preparation and investigation. In such a case, it is essential that counsel test his client's case by other means, and it was unreasonable for Bohlen not to do so.

Present counsel argue that perhaps the most problematic result of Bohlen's total lack of preparation and investigation in this case is that it made it impossible for him to offer reasoned advice to his client on whether to take the stand in his own defense. In a case such as this one, where there is a substantive defense that the defendant could offer, it is essential that counsel investigate that defense before helping his client make a decision whether to take the stand. While it is often the case that a defendant is well advised not to testify (and having heard Reeves testify

myself and witnessed his demeanor, I cannot necessarily disagree with that decision here), it is essential that a defendant benefit from reasoned and researched advice from counsel in making that decision.

I consider Bohlen's performance in preparing for this trial to be dangerously and inexcusably close to the line of ineffective assistance, if not over it. While the law presumes an attorney's competence and reasonableness, I can find no reasonable trial strategy in failing to investigate a case at all. Ultimately, as I discuss below, the defendant was not prejudiced by his counsel's incompetence, however. Therefore, I need not and do not decide as a matter of law whether Bohlen's representation rose to the level of constitutionally ineffective assistance of counsel.

B. Prejudice to Reeves

Assuming that trial counsel's performance constituted ineffective assistance, the next question I must ask is whether, considering all the circumstances, there is a reasonable probability that, but for counsel's unprofessional errors, the jury would not have returned a guilty verdict. Investigation by Reeves's present counsel has added several new pieces of evidence to the mix presented at trial: Reeves's testimony, additional impeachment evidence for Elliott, documentation and valuation of the equipment at the South Federal Street site and at Reeves's home; the September 1995

memorandum, and the November 1995 letter. [2]For its part, the government impeached Reeves's testimony with misrepresentations and inconsistencies he made on various loan applications, as well as on his resume.

The most significant new evidence is, of course, Reeves's testimony. He contends that had he testified and had the additional impeachment evidence been used against Elliott, a jury reasonably could have believed him and not Elliott. Having personally heard Reeves testify at the evidentiary hearing, and remembering the evidence as it came in at trial, I do not agree that Reeves's testimony — had it been offered — alone would have changed the verdict. He has too many empty explanations for the many oddities in his business practices in this case, and the government effectively cross-examined him with seemingly false statements made on numerous loan applications in the past. I found Reeves's explanations about his many businesses, and the misuse of the various fictional addresses, unpersuasive, and they are not persuasive evidence of his innocence. The fictional nature of the addresses, their mix-and-match nature, and his failure to register any of them with the Secretary of State, all

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[2]Reeves also asserts that other CCI employees could testify about work he accomplished while employed there and that other persons with whom he had done business over the years through his various companies could testify about the legitimacy of the work he did with them. That information might have been helpful. But as no actual evidence is before me, I do not assume that it exists and cannot consider it when evaluating whether Reeves was prejudiced by his trial counsel's performance.

undermines his testimony about the businesses' legitimacy.

Nor do I think the additional impeachment evidence proffered against Elliott would have damaged his credibility much more than already was done at trial. Elliott's prior convictions came in at trial and the jury considered them in its deliberations. The defense has not offered, and I do not find obvious, what Elliott's motive to lie would be in this case. Given Reeves's credibility problems. his motive to lie on the stand, and the jury's knowledge of Elliott's credibility problems at the time it considered his testimony, I do not think Reeves's testimony could have changed the jury's verdict. At best, Reeves's testimony can be heard to mean that Elliott was in on the scheme to defraud CCI as well - but pointing a finger at a possible unindicted co-conspirator is not a defense.

What, then, if the jury had considered the additional corroborative evidence as well? It is clear now that the defense cannot say that the equipment was actually purchased, or that the equipment at either the South Federal Street station or at his house is equipment Reeves bought. There is no testimony from anyone other than Reeves on this issue; the private investigator learned his information from Reeves alone. The evidence therefore suffers from the same self serving credibility problems as does Reeves"s personal testimony, as well as the additional problem that it is evidence that should be independently confirmable. Surely, other persons the installer, or the vendor, say —

could have testified as to when the equipment at the South Federal Street station — as purchased and installed and by whom. Purchase receipts could have been obtained from the vendor, or at the very least, an independent valuation procured for all the equipment. Absent any independent confirmation of Reeves's purported completion of the purchases and installation, I do not think the evidence would have impacted the jury's verdict. These are the kinds of omissions jurors notice and question. In any event, none of this evidence goes to answer the many inconsistencies and fictional addresses in the check requisition forms, or the self-dealing apparent in the deposits made to bank accounts controlled by Reeves. The September 1995 memorandum and the November 1995 letter, both of which Reeves authored, are similarly unpersuasive in light of the many unexplained inconsistencies revealed by the documents and money trail. Ultimately, all of the additional evidence comes from Reeves himself uncorroborated even after the efforts of his present and highly competent counsel, and given his own credibility problems, its submission to the jury would not have produced a different result.

This is a close case in the sense that the cold record does not mandate the result. Frankly, I would have been unable to decide this matter had I not sat through trial and had I not seen and heard Reeves testify at the § 2255 hearing. But I did, and I have come to clear judgment that Reeves deserved much better lawyering than he received, but that in the end, the result inevitably would have been the same.

III. Conclusion

For the foregoing reasons, petitioner's § 2255 petition is denied.

ENTER: James B. Zagel
United States District Judge

DATE: 13 SEP 2000

United States District Court
Northern District of Illinois
Eastern Division

JUDGMENT IN A CIVIL CASE

Case Number: 99 C 4537

MICHAEL REEVES

v.

UNITED STATES

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that the petition for a writ of habeas corpus is denied.

Date: 9/13/2000

Michael W. Dobbins, Clerk of Court.

A20

No. 00-3774.

United States Court of Appeals,
Seventh Circuit.

Michael REEVES,
Petitioner-Appellant,

v.

UNITED STATES of America,
Respondent-Appellee.

Argued May 14, 2001.

Decided June 22, 2001.

Federal prisoner convicted of mail fraud filed motion to vacate, set aside, or correct his sentence. The United States District Court for the Northern District of Illinois, James B. Zagel, J., 2000 WL 1368044, denied motion, and prisoner appealed. The Court of Appeals, Bauer, Circuit Judge, held that prisoner had not been deprived of effective assistance of counsel.

Affirmed.

1. Criminal Law 641.13(1)

Defendant asserting claim of ineffective assistance of counsel bears burden of showing that his counsel's performance fell below objective standard of reasonableness and outside wide range of professionally

competent assistance, and that he suffered prejudice as result, such that, but for counsel's unprofessional errors, there is reasonable possibility that result in his case would have been different. U.S.C.A. Const. Amend. 6.

2. Criminal Law 641.13(1)

Defendant alleging ineffective assistance of counsel is not required to prove actual innocence or that outcome would have more likely than not been different. U.S.C.A. Const. Amend. 6.

3. Criminal Law 641.13(6)

Defendant convicted of mail fraud based on- his use of mails in scheme to defraud his employer was not denied effective assistance of counsel as result of counsel's failure to investigate and his recommendation that defendant not testify on his own behalf, even if credibility of main witness against him was weak because of his prior convictions, where thrust of government's case was documentary evidence, defendant was not credible witness, and new evidence presented by defendant did not undermine jury's verdict. U.S.C.A. Const. Amend. 6.

Steven Shobat, David S. Mejia (argued), Chicago, IL, for petitioner-appellant.

Brian R. Havey (argued), Office of the U.S. Attorney, Civil Division, Appellate Section, Chicago, IL, for respondent-appellee.

Before BAUER, ROVNER, and DIANE P. WOOD, Circuit Judges.

BAUER, Circuit Judge.

Michael Reeves filed a petition under 28 U.S.C. § 2255 challenging his conviction as obtained in violation of his Sixth Amendment right to effective assistance of counsel. The district court denied the petition because Reeves failed to demonstrate prejudice. Reeves appeals, and we review the denial of relief under § 2255 *de novo*. See *Blacharski v. United States*, 215 F.3d 792, 794 (7th Cir. 2000).

BACKGROUND

Reeves, represented at trial by attorney Christopher L. Bohlen (and L. Patrick Power, whose nominal role will not be discussed), was convicted by a jury in June of 1998 of mail fraud under 18 U.S.C. § 1341 for using the mails in a scheme to defraud his employer, Cherry Communications, Inc. ("CCI"), of money for work on two projects that he failed to complete and for depriving CCI of honest services by not disclosing his self-dealing.

At trial the following evidence was adduced. CCI was a long-distance telephone company headquartered in Westchester, Illinois owned by James Elliot. Elliot and CCI's President, Michael Dyer, wanted to expand the business by constructing switch sites to route calls on its long distance network. Lacking the skill to do this

themselves, they hired Reeves as Vice President of Engineering in January of 1995. Reeves' resume indicated that he had completed two years at MIT and two years at Florida State University, earning a B.S. in electrical engineering. Elliot and Dyer bragged to others that Reeves had a "double E from MIT." In reality, while Reeves had taken some classes, he never earned a degree.

To purchase equipment to construct the switch sites, Reeves was instructed to submit a check requisition form to Elliot for approval and then to CCI's comptroller, Cherrie Marks-Pozniak, who would issue a check. On July 6, 1995, Reeves submitted a check requisition form to Elliot for the purchase of $6,627 worth of equipment to be installed at the South Federal Street switch site in Chicago from a company named Electronic Products located at 6645 La Pas, Indianapolis, Indiana 60164. Elliot approved the request and Marks-Pozniak gave Reeves a check payable to Electronic Products, whereupon it was endorsed with a typewriter and deposited in a bank account Reeves had opened under the name Electronic Renaissance.

On July 14th, Reeves submitted another form to Elliot for more equipment for the South Federal Street site payable to Electronic Products for $15,172. The address listed for Electronic Products this time though was 6264 La Pas, Indianapolis, Indiana 60155. Furthermore, an invoice submitted with the check requisition form listed yet another address for Electronic Products — P.O. Box 307, Bradley, Illinois

which had been rented by Reeves under the name Electronic Renaissance. The invoice also stated that the equipment was to be billed and shipped to CCI at 6264 La Pas, Indianapolis, Indiana 60155. Despite these inconsistencies, Elliot approved the request, and again, a check was given to Reeves, endorsed with a typewriter, and deposited in the Electronic Renaissance bank account.

In August, Reeves recommended that CCI buy alarm systems to secure its unmanned switch sites. Elliot and Dyer approved the purchase of the systems for over $88,000, to be paid in four monthly installments. Reeves submitted a form for the first installment, to be paid to a company named Digital Alarm Products at P.O. Box 172, Bradley, Illinois. Marks-Pozniak asked Reeves if she should contact the vendor to set up a payment schedule. Reeves insisted that he ask himself because the vendor was "touchy" and "didn't like to talk to just anybody." CCI issued the first installment check on September 7th for $22,173. Reeves was given the check, it was endorsed with a typewriter and deposited in the Electronic Renaissance bank account.

On September 8th, although CCI was unaware of Reeves' dealings, he was fired for poor job performance. Still ignorant, on October 18th, CCI issued a $22,173 check for the second installment. Since Reeves was gone, CCI mailed it to the P.O. Box listed on the invoice, which unbeknownst to CCI was rented by Reeves. As before, the check was endorsed with a

typewriter and deposited in the Electronic Renaissance bank account.

Robert Carrabis, who became Vice President of Engineering after Reeves' termination, noticed that the alarm system had never been delivered, so he called Digital Alarm Products to inquire and heard Reeves' voice on the company's answering machine. Finally realizing that something was amiss, CCI hired a private investigator and informed the police. They discovered that neither the Illinois nor Indiana Secretary of State offices had records for companies named Electronic Products or Digital Alarm Products.

At trial, the government charged that Reeves' scheme was to submit false forms from phony equipment suppliers to obtain money from CCI to satisfy his personal debt. To prove its theory, the government offered the testimony of Elliot, Dyer, Carrabis, Marks-Pozniak, and a postal inspector who attested that the addresses given for Reeves' companies were fictitious. A bank employee also introduced the Electronic Renaissance account records and a summary chart of expenditures made from the account with money from CCI. It was also shown that Reeves' bank account had been overdrawn several times in the months before he undertook this scheme, and in June of 1995 his balance was $8.17. The government also proved that checks written on the Electronic Renaissance account with CCI's money were issued to, among others, American Express, Kankakee Bell Credit Union for a loan payment, Ameritech, Dr. Martello,

Reeves himself, and cash. Other documentary evidence included the check requisition forms and invoices submitted by Reeves and his 1995 federal income tax return showing that he did not report income realized by his companies from CCI.

Reeves' attorney cross-examined the government's witnesses. Reeves did not take the stand or present witnesses in his defense. Reeves' defense was that the government failed to meet its burden of proof because Elliot's testimony was incredible in light of his prior criminal convictions, and the government had failed to prove that any check had been mailed using the U.S. Postal Service.

After Reeves was convicted and sentenced, he filed a direct appeal, voluntarily dismissed it, and then filed a § 2255 petition. The district court permitted discovery held an evidentiary hearing, and heard oral arguments on Reeves' § 2255 petition.

At the evidentiary hearing on April 14, 2000, Reeves testified that Bohlen met with him three times prior to trial — in September of 1997, and in February and May of 1998 — and that the brief meetings were not substantive. Bohlen testified that he did not take notes of these meetings and could not recall what had been discussed. At the first meeting Reeves told Bohlen to visit the South Federal Street site because he had purchased and installed equipment there. Bohlen confirms that Reeves said this, but admits that he did not go see whether the equipment was indeed there.

Reeves also told Bohlen that some of the alarm system equipment was at his home, but again, Bohlen did not investigate the claim. Reeves further said to Bohlen that he had partially performed on the alarm system project by diagraming a plan and gathering parts, which were still in his garage. He claimed that he would have finished if he had received the final two installment checks. Instead of investigating, Bohlen asked Reeves for documentation of the purchases, but Reeves did not have any. Bohlen admitted that in preparing for trial he did not interview anyone except Reeves and told him not to testify.

In support of his contention that he had fully performed the South Federal Street job and partially performed the alarm system project, Reeves offered a report of a private investigator who visited the South Federal Street site and Reeves' garage, accompanied by Reeves. The report said that there was equipment at the South Federal Street site, which Reeves identified as the equipment he had purchased. It also stated that there was electrical equipment in Reeves' garage. Reeves also offered copies of a memorandum he had written to Dyer dated September 6th, two days before he was fired, detailing the work he had completed and of a letter be wrote to Elliot in November, offering to complete the alarm project despite his termination. Reeves had given Bohlen these documents, but they were not used at trial. Furthermore, Reeves testified that Elliot asked him to purchase equipment through his companies because CCI was having financial difficulties. Reeves claimed that his companies had been

in business for many years and were not fictitious, and he was ignorant of the fact that he had to register with the Secretary of State.

Finally, Reeves testified about his personal background, specifically that he had served in the military for ten years where he enjoyed FBI and top-security clearance and had worked for several telecommunications companies before CCI. He explained that he took some classes at MIT over a two-year period, but denied that he told Elliot or Dyer that he was a "double E from MIT."

On cross-examination, Reeves said that he had no documentation, such as invoices or checks, to show that he bought equipment for CCI. He admitted that he used fictitious addresses on the check requisition forms. He could not explain why he was the, only signatory on the Electronic Renaissance bank account since he claimed that the company was owned by someone else. Further, the government offered evidence admissible under Fed.R.Evid. 404(b), namely that Reeves had made false statements in bank loan applications, in his resume to CCI, in his 1995 federal income tax return, and in the unemployment application he filed with the State after he was fired from CCI.

Reeves contends that the new evidence supports his defense that he did not intend to defraud CCI. The district court saw it otherwise and denied the § 2255 petition. The court noted that it found Bohlen's "performance in preparing for this trial to be

dangerously and inexcusably close to the line of ineffective assistance, if not over it. While the law presumes an attorney's competence and reasonableness, I can find no reasonable trial strategy in failing to investigate a case at all." However, the district court declined to hold that Bohlen's performance, even if ineffective, prejudiced Reeves' case.

The district court summarized that all of the "new" evidence emanated from Reeves or the investigator, whose work was based on what Reeves told him. For example, the memorandum and letter were written by Reeves. No other witnesses, such as a vendor, testified that Reeves' businesses were legitimate or that he had purchased equipment for the projects. No invoices, receipts or checks were produced to verify that he had purchased equipment. No explanations were given as for why Reeves used fictional addresses on check requisition forms. The district court found that Reeves' self-serving evidence did not undermine confidence in the outcome. The court wrote: "Ultimately, all of the additional evidence comes from Reeves himself uncorroborated ... and given his own credibility problems, its submission to the jury would not have produced a different result."

The district court also found that the additional impeachment evidence for Elliot, namely the fact that he owned CCI when it went bankrupt and had judgments entered against it for nonpayment of taxes, would not have damaged his credibility beyond that already done at trial. Elliot's prior convictions had

already been testified to in order to impeach him at trial, so the jury weighed his two convictions for mail fraud and one conviction for providing false information to a federal law enforcement officer in assessing his credibility. Further, the jury heard and considered the parties' stipulation that CCI had filed a voluntary bankruptcy petition at the time of trial. The district court reasoned that since the defense offered no motive for Elliot to lie, there was no reasonable probability that a jury would assess Elliot's credibility differently.

The district court concluded that: "[h]aving personally heard Reeves testify at the evidentiary hearing, and remembering the evidence as it came in at trial, I do not agree that Reeves' testimony – had it been offered – alone would have changed the verdict." The court so held because Reeves had "too many empty explanations for the many oddities in his business practices," the "fictional nature of the addresses, their mix-and-match nature, and his failure to register any of them with the Secretary of State, all undermines his testimony about the businesses' legitimacy," and Reeves' explanations were "not persuasive evidence of his innocence." The court also added that the government had effectively cross-examined Reeves. Based on all of the foregoing, the district court denied Reeves' petition.

DISCUSSION

[1] Under *Strickland v. Washington*, Reeves bears the burden of showing that his counsel's performance fell below an objective standard of

reasonableness and outside the wide range of professionally competent assistance. See 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). He must also show prejudice, which means showing that but for his counsel's unprofessional errors, there is a reasonable probability that the result in his case would have been different. *See id.* at 694, 104 S.Ct. 2052. A reasonable probability is a probability sufficient to undermine confidence in the outcome, although merely some conceivable effect of the errors on the outcome is not enough. *See id.*

Reeves' first argument is that the district court applied the wrong legal standard to his case. In the beginning, the district court articulated the proper standard; Reeves' contention is that after the district court mouthed the correct standard it turned around and held him to a higher one. Reeves contends that the district court misapplied the prejudice prong of *Strickland* by (1) requiring him to prove that he was actually innocent, (2) requiring him to prove that the outcome would have more likely than not been different but for his attorney's errors rather than just a reasonable probability of a different outcome, and (3) resting its decision solely on Reeves' credibility instead of the totality of the circumstances, Reeves misreads the court's opinion.

[2] While Reeves is correct that requiring a defendant to prove actual innocence or that the outcome would have more likely than not been different would be an incorrect articulation or application of the

prejudice test, *see generally Glover v. United States,* 531 U.S. 198, 121 S.Ct. 696, 700-01, 148 L.Ed.2d 604 (2001), *Williams v. Taylor,* 529 U.S. 362, 120 S.Ct. 1495, 1513-14, 146 L.Ed.2d 389 (2000), we find that after giving the district court's opinion a thoughtful read that there is not a scintilla of support for Reeves' analysis of the district court's opinion. It is enough to say that Reeves' appellate argument quotes the words chosen by the district court out of context. The very heart of the opinion was an examination of the totality of the evidence to determine whether the court's confidence in the jury's verdict was undermined by the new evidence. The district court concluded that his confidence in the verdict remained intact.

[3] Reeves' second argument is that if the district court had applied the correct standard it would have found that his case had been prejudiced. We disagree, Reeves paints the government's case as based on weak circumstantial evidence and Elliot's incredulous testimony. Given the weakness of the case against him, he asserts that if he had testified a different outcome may well have resulted because the jury would have been asked to resolve a credibility contest between him and Elliot. Not so. The case would not have become merely a "he said, he said" if Reeves had testified; not only did Dyer and Marks-Pozniak corroborate Elliot's testimony, but the thrust of the government's case was documentary evidence. In contrast, Reeves offered self-serving statements and documentary evidence of little relevance. The memorandum and letter offered by Reeves shed little light on the matter; they were written

by Reeves who had an overwhelming interest in covering up what he was or was not doing during his employ at CCI.

Reeves also complains that the district court improperly based its decision solely on his credibility. He asserts that the district court should not have decided whether it found Reeves credible, but rather should have decided whether confidence in the jury's verdict had been undermined. But, we read the opinion as saying exactly the latter-after hearing the evidence presented by the defendant, the court's confidence in the outcome had not been undermined. This is quite different from the court saying that it did not think that a jury would believe Reeves. Moreover, the district court lingered on Reeves' credibility as a witness because, not only was it the bulk of the new evidence, but one of Reeves' claims was that Bohlen was deficient for not allowing him to testify. In response the court evaluated whether the new evidence presented through Reeves' testimony had a reasonable probability of altering the result. The court's opinion carefully assessed all of the new evidence, including Reeves' testimony, and found that it offered little, as do we.

CONCLUSION

The district court's denial of Reeves' § 2255 petition is hereby AFFIRMED.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

August 8, 2001

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*

Hon. LLANA DIAMOND ROVNER, *Circuit Judge*

Hon. DIANE P. WOOD, *Circuit Judge*

No. 00-3774

MICHAEL REEVES,

Petitioner-Appellant,

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

v.

No. 99 C 4537
James B. Zagel, *Judge.*

UNITED STATES OF AMERICA,
Defendant-Appellee.

ORDER

On consideration of the petition for rehearing and petition for rehearing *en banc* filed in the above-

entitled cause by petitioner-appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny rehearing. Accordingly, the petition for rehearing is DENIED.